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In the Supreme Court of the United States

OCTOBER TERM, 1976

ILLINOIS TERMINAL RAILROAD COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 541 F. 2d 201. The order of the Interstate Commerce Commission (Pet. App. A54-A56) is not officially reported. The Commission's regulations (Pet. App. A95-A99) are codified at 49 C.F.R. 1036.3 and 1036.4. The order initally promulgating those regulations and the supporting report (Pet. App. A14-A49) are reported at 337 I.C.C. 217. An order and report amending the regulations (Pet. App. A57-A101) are reported at 349 I.C.C. 303.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1976. A timely petition for rehearing was denied on September 24, 1976 (Pet. App. A13).

The petition for a writ of certiorari was filed on December 16, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Interstate Commerce Commission acted within the scope of its authority under Section 1(14)(a) of the Interstate Commerce Act, 24 Stat. 379, as amended (49 U.S.C. 1(14)(a)), in requiring railroads receiving "incentive per diem" (IPD) payments to earmark such income for the purchase, lease, building, or rebuilding of boxcars.

STATEMENT

1. Well before the end of the nineteenth century, the nation's railroads abandoned the inefficient practice of physically transferring freight between the cars of connecting railroads and began to interchange their cars. *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 743. Enactment of the Interstate Commerce Act later made such interchange mandatory on all through routes. See *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612, 615; *Chicago, R.I. & P. Ry. Co.* v. *United States*, 284 U.S. 80, 91, 101-103. The country's freight car supply, although still owned by individual railroads, thus became in essence a common pool. This system of interchange, while indisputably the most efficient method of operation, nevertheless contributed to a chronic nationwide shortage of freight cars; railroads found that using the cars of other roads could be more profitable than acquiring and maintaining cars of their own. See *United States* v. *Allegheny-Ludlum Steel Corp.*, *supra*, 406 U.S. at 745.

In an effort to relieve the freight car shortage, Congress in 1966 amended Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. 1(14)(a),[1] to authorize the Commission to increase the "per diem" compensation paid by one railroad for the use of another's cars "by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices * * *, and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense." The Commission was directed not to make incentive per diem (IPD) charges applicable to any type of freight car the supply of which the Commission found to be adequate.

After conducting a comprehensive study of the freight car supply, issuing an interim report accompanied by proposed rules, and receiving the comments of all interested parties, the Commission found that certain types of boxcars are in short supply and adopted IPD rules applicable to such cars. Ex Parte No. 252 (Sub-No. 1), *Incentive Per Diem Charges-1968*, 337 I.C.C. 217, sustained *sub nom. Florida East Coast Ry. Co.* v. *United States*, 368 F. Supp. 1009 (M.D. Fla.), affirmed *per curiam*, 417 U.S. 901. The rules (codified at 49 C.F.R. Part 1036) establish a level of IPD charges which, in the Commission's judgment, will promote the acquisition and maintenance of an adequate boxcar fleet. The "heart and soul" (*Florida East Coast, supra*, 368 F. Supp. at 1017) of the rules is the requirement that a railroad's net credit balance of IPD charges, less income taxes paid on such income, be "earmarked" and expended

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[1] Pub. L. 89-430, 80 Stat. 168. Section 1(14)(a) was further amended by Section 212 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, 46.

only to purchase, lease, build or rebuild boxcars which the Commission has found to be in short supply. 49 C.F.R. 1036.3.

2. Petitioner is a "creditor" IPD railroad, having enjoyed IPD receipts in excess of IPD payments in the amount of $1,295,910 for the years 1970-1973. Previously, during the periods 1962-1965 and 1967-1969, petitioner had suffered net operating losses (NOL) which, under Section 172(b)(1)(C) of the Internal Revenue Code of 1954, as amended (26 U.S.C.), may be carried forward seven years to offset future income. By carrying forward the losses, petitioner was able to escape any federal income tax liability for the years 1970-1973, including $673,958.48 in taxes otherwise payable on its IPD income. Petitioner then transferred the latter amount from its segregated IPD account to a general corporate account not subject to the spending restrictions of the Commission's rules (Pet. App. A3-A4).

The Commission disallowed that transfer and directed petitioner to reimburse its IPD account (Pet. App. A50-A56). The agency construed its rules as authorizing a deduction from the IPD account only for income taxes actually paid and rejected petitioner's contention that *avoidance* of taxes on IPD income through the use of NOL carryovers derived from general corporate operations is the equivalent of *payment* of taxes on IPD income with general corporate funds. However, the Commission did indicate that a transfer of funds from petitioner's IPD account would be permitted if that carrier were required in future years to pay taxes on general corporate income that would have been avoided but for the use of NOL carryovers to offset IPD income.

The court of appeals sustained both the Commission's statutory authority to require earmarking of IPD funds and the application of the earmarking provision to the

facts of this case. With reference to this Court's recent decision in *United States* v. *Chesapeake & Ohio Ry. Co.*, No. 75-420, decided June 17, 1976, slip op. 4 (hereinafter "*Chessie*"), the court of appeals found the earmarking requirement to be "a legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power" to establish IPD rates (Pet. App. A7). In response to petitioner's contention that it was deprived of its NOL carryovers without receiving any benefit in return, the court noted that the taxes saved by the railroad on its IPD income can be invested in its own car fleet (Pet. App. A11).

The petition for a writ of certiorari renews petitioner's contention that the Commission lacks statutory authority to require earmarking of IPD funds, but does not otherwise seek review of the application of the earmarking provision to the facts of this case.

ARGUMENT

The court of appeals properly rejected petitioner's contention that the Commission is not authorized to require earmarking of IPD funds, and its decision does not warrant further review by this Court.

As the court of appeals held (Pet. App. A9-A10), Section 1(14)(a) not only authorizes the Commission to include an incentive element in fixing the compensation to be paid for the use of freight cars, but also empowers the Commission to "establish reasonable rules, regulations, and practices with respect to car service * * *, *including the compensation to be paid* * * * " (emphasis added). "[C]ar service," in turn, includes the "use, control, *supply*, movement, distribution, exchange, interchange, and return of * * * cars * * *." 49 U.S.C. 1(10) (emphasis added). Compensation paid by one railroad to another—especially incentive compensation—is an aspect

of car service intimately related to car supply. The requirement that IPD funds be used to augment the car fleet is thus a "reasonable rule * * * with respect to car service" which Congress authorized the Commission to make under Section 1(14)(a).

The legislative history of the 1966 amendment to Section 1(14)(a) confirms this conclusion. This history reflects Congress' dissatisfaction with the railroad industry's efforts to alleviate the chronic freight car shortage and Congress' intent to give the Commission plenary power to reduce the car shortage through an effective IPD program. As the House report on the legislation stated (H.R. Rep. No. 1183, 89th Cong., 1st Sess. 4 (1965)), "If the railroads and their associations cannot meet this demanding problem, then we believe the Commission should have the necessary tools to solve this difficult and long-continuing dilemma." Moreover, Congress expressed a clear preference for abating the car shortage with railroad funds and did "not look with favor on legislation to subsidize the construction of new cars for railroads or to build and lease new cars to railroads so long as other methods are available." S. Rep. No. 386, 89th Cong., 1st Sess. 7 (1965). In this context, and especially in view of the well-settled principle that remedial legislation is to be construed liberally in accordance with its purpose (see, *e.g.*, *Tcherepnin* v. *Knight*, 389 U.S. 332, 336), the court of appeals correctly rejected petitioner's restrictive reading of Section 1(14)(a).

Furthermore, the court of appeals correctly concluded that the authority to require earmarking of IPD funds, like the spending limitation upheld by this Court in *Chessie*,[2] is a "legitimate, reasonable, and direct ad-

[2]In *Chessie*, virtually all the nation's railroads had filed with the Commission a joint petition for a general rate increase which alleged that billions of dollars were needed for deferred maintenance and capital improvements. The Commission granted the increase subject to the condition that the railroads devote the additional revenues to the purposes they claimed justified the increase. Despite the absence of specific statutory authority for such a spending limitation, this Court held it to be a "legitimate, reasonable, and direct adjunct to the Commission's specific statutory power to suspend rates pending investigation." Slip op. 14.

junct" to the Commission's explicit statutory power. Indeed, the Commission's implicit authority to require that IPD funds be used to augment the freight car fleet is even more a "direct adjunct" to its statutory mandate than was the agency's power to restrict expenditure of the funds derived from a general rate increase; while *Chessie* involved rail revenues earned through general operations, the instant case involves a special form of income earned on freight cars pursuant to a regulatory program expressly designed to bolster the freight car fleet.

Although petitioner questions only the Commission's authority to require earmarking and not the reasonableness of the earmarking provision itself,[3] the provision's effectiveness in furthering the Congressional purpose underlying Section 1(14)(a) is persuasive evidence of the Commission's authority to promulgate it. All railroads are "captive" co-partners in the statutorily mandated national car-pool system and must pay IPD while using cars owned by other roads. But not all railroads have an equal opportunity to earn IPD income. Since much of the nation's freight regularly moves from producing to consuming regions (*e.g.*, from the Midwest to the populous Eastern States), certain railroads must inevitably terminate more shipments than they originate and, consequently, must pay more IPD than they receive. While

[3]*Florida East Coast Ry. Co.* v. *United States*, *supra*, 368 F. Supp. at 1017, affirmed *per curiam*, 417 U.S. 901, stated that "the earmarking of funds provision of the ICC regulation * * * is * * * rationally supported as a method helping to alleviate the shortage."

such railroads cannot be expected to own as many boxcars as originating lines, they nevertheless have an interest in the overall adequacy of the car fleet and are properly required to pay IPD. The earmarking requirement insures that IPD funds paid by these terminating lines will be used to increase the car supplies of originating railroads for which car ownership is more practical. As the court of appeals concluded (Pet. App. A9), the power to require that IPD receipts be spent on boxcar acquisition prevents "profiteering" by IPD creditor railroads and is therefore implicit in the Congressional mandate authorizing use of IPD charges when necessary to alleviate car shortages.

Finally, even assuming the continued vitality of this Court's decision in *United States* v. *Pennsylvania R. R. Co.*, 242 U.S. 208, petitioner's reliance on that case is misplaced. In *Pennsylvania R.R.*, this Court held that the Commission lacked the power to order railroads to purchase particular types of equipment. Petitioner contends that the decision here conflicts with *Pennsylvania R.R.* because, according to petitioner, the decision implies "that the Commission has authority to interfere in the financial management of carriers by ordering them to purchase freight cars with their general funds, or even to order railroads to borrow moneys for the purpose of acquiring freight cars" (Pet. 20). However, as the court of appeals noted (Pet. App. A10, n. 7), *Pennsylvania R.R.* was decided before the 1920 amendments to the Act, which were intended to supply to the Commission the powers this Court found to be lacking. See 49 U.S.C. 1(10)-1(17). In any event, the Commission's IPD rules do not require any railroad to expend general funds for any purpose; those rules merely require that incentive funds earned from other railroads for the use of freight cars be used to improve the freight car

fleet. The extent of the Commission's authority to compel the expenditure of general funds was thus not at issue before the court of appeals and is not at issue here.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]The Commission recently asserted its authority to compel the expenditure of general funds by ordering the nation's railroads to show cause why they should not be required to purchase additional equipment. *Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution, Rules and Practices*, 346 I.C.C. 497. The extent of the Commission's authority in this area may be determined upon review of a final order issued in that proceeding.

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